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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200105
Party	Plaintiff NOVOZYMES BIOAG, INC.
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Date	02/22/2012
Attachments	Response to Brief in Support of Motion to Restrict Identification of Goods.PDF (3 pages)(66201 bytes) Response to Brief in Opposition to Motion for Summary Judgment.PDF (5 pages)(167713 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NOVOZYMES BIOAG, INC. (formerly EMD CROP BIOSCIENCE, INC. Opposer, v. CLEARY CHEMICALS, LLC, Applicant.	)	Opposition No. 91200105

RESPONSE OF OPPOSER TO CLEARY'S BRIEF IN SUPPORT OF MOTION TO RESTRICT IDENTIFICATION OF GOODS OF OPPOSER

Opposer submits the following comments in reply to Cleary's brief in support of its motion to restrict the identification of goods in opposer's registration.

Cleary has presented a unique theory in trademark law. In addition to amending its own goods, Cleary asked that the Board also restrict the senior (by three years) user's registration to exclude the precise goods on which applicant proposes to use the identical mark. In particular, Cleary prays in paragraph 8 of its Amended Request to Restrict the Identification of Goods that "EMD [NBA's] Registration should be restricted to exclude fungicides for outdoor terrestrial turf and ornamental agricultural fungicides from the description of its goods." The definition of goods in opposer's Reg. No. 3511124 currently reads "natural molecule or bacteria for plant growth enhancement in agricultural crops." Cleary never recites the proposed final definition of goods in opposer's registration, but presumably under Cleary's proposal these goods would read "natural molecule

or bacteria for plant growth enhancement in agricultural crops, excluding fungicides for outdoor terrestrial turf and ornamental agricultural fungicides." This makes little sense. Opposer's goods do not include fungicides in the first instance. The goods are very specific, and it is not seen how they can be amended to exclude fungicides of any type. What would be the purpose of this restriction? Does Cleary think that this restriction would eliminate likelihood of confusion? This proposition would revolutionize inter partes practice. The owner of every opposed mark or every mark sought to be canceled would simply ask the Board to restrict the senior user's goods and registration to exclude the second user's goods.

If Cleary is under the impression that the exclusion of fungicides from opposer's registration solves the likelihood of confusion question, it should have no difficulty making that argument because opposer's goods in Reg. 3511124 make no mention of fungicides of any type.

In summary, opposer's motion to strike applicant's request to restrict opposer's goods or judgment on the pleadings denying such request is clearly in order.

Respectfully submitted,

Novozymes BioAg, Inc.
By its Attorneys

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Certificate of Service

I hereby certify that on February 22, 2012 a true and correct copy of Response of Opposer to Cleary's Brief in Support of Motion to Restrict Identification of Goods of Opposer were served by first-class mail, postage prepaid, with a courtesy email, to counsel for Applicant, Cleary Chemicals, Inc.:

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By: Edward M Prince
Edward M. Prince

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NOVOZYMES BIOAG, INC. (formerly EMD CROP BIOSCIENCE, INC. Opposer, v. CLEARY CHEMICALS, LLC, Applicant.	)	Opposition No. 91200105

Response of Opposer to Cleary's Brief in Opposition to Opposer's Motion for Summary Judgment on Fraud Counterclaim

To put this issue in perspective, please understand that Cleary filed an intent-to-use application on the mark TORQUE in 2010. The issue being advanced by Cleary was whether opposer, through its predecessor, knowingly and with intent to deceive the USPTO declared that its specimen of use of the mark was in use as early as the application filing date. There has been no contention that the mark TORQUE was not in use in 2007. Rather, it is contended that for some deceptive reason opposer's predecessor submitted a 2008 specimen while stating that the specimen was in use in 2007. The Broughton declaration explained that the 2007 label was no longer in use and had been replaced by the 2008 label at the time the application specimen was submitted. A comparison of the two labels shows no material difference.

In the accompanying declaration of Tama Drenski, it is argued that Cleary has not had an opportunity to depose Mr. Broughton or otherwise challenge his self-serving statement. These are not self-serving statements. Mr. Broughton

simply identifies documents from which all of the facts become self-evident. What is clear from the exhibits attached to the Broughton declaration is that the mark TORQUE was used in 2007 and 2008 and that the specimen submitted showed how it was used in both years.

Ms. Drenski observes in her declaration that Novozymes does not give an explanation as to why the application to register was initially filed without a specimen and was not signed and verified (Drenski, ¶ 13) and notes that Mr. Broughton does not attempt to explain these deficiencies (Drenski, ¶ 14). Contrary to the implication in Cleary's papers, neither Novozymes nor Mr. Broughton was involved in preparing or prosecuting the application. Rather, it was Novozyme's predecessor Merck that prepared and prosecuted the application. If any deposition needs to be taken on the matters raised in paragraphs 13 and 14 of the Drenski declaration, it needs to be taken from the individuals in Europe who signed the declaration for Merck. Such testimony has no bearing on the present fraud case. In footnote 6 on page 9 of the opinion, the Board expressly advised Cleary that these omissions did not amount to fraud. If Mr. Broughton had any information on these application deficiency issues, which is doubted, the information has no relevance on the fraud case. Thus, the claim by Cleary's attorney that it cannot respond to the motion for summary judgment because Cleary needs to take Mr. Broughton's deposition makes no sense.

The fraud claim is based solely on the assertion that opposer's predecessor submitted a 2008 label and claimed that it was in use in 2007. No attempt was made to conceal the copyright date on the label. There is no denial

by Novozymes that a 2008 label was submitted as evidence of use of the mark in 2007. The 2008 label shows exactly how the mark was used in 2007. Certainly, that Mr. Broughton's deposition does not have to be taken to re-identify the documents submitted therewith.

Finally, throughout the Drenski declaration and Cleary's papers, it is contended that no sworn statement has been offered by Novozymes to state that a false statement was made in error without deceptive intent. It is clear that a false statement was made in error. It is also abundantly clear that the statement was made without deceptive intent. The falsity and lack of deceptive intent are readily apparent from documentary proof.

Exhibit 1 shows the label that was in use in 2007 (and discontinued when the size of the container was changed). The 2008 label was attached to the declaration and filed in the trademark application. The similarity of both labels can be easily seen with the exception of the size of the container. It should be noted that the product number for TORQUE on each label is 8300. Exhibit 3 is an invoice showing an interstate sale on March 27, 2007 of product number 8300 which is the TORQUE product. Exhibit 4 shows a "sale by item" summary for 2007 of product number 8300 – namely, TORQUE. Thus, all of the issues on which Cleary wants to examine Mr. Broughton have been shown by documentary proof. The documents submitted with the Broughton declaration establish that there was no deceptive intent. It is illogical to assume that deception was necessary to acquire this registration when in fact the mark had been in use on a 2007 label substantially identical to the 2008 label. The 2008 label showed how

the mark was used in 2007. The statement saying that the specimen was in use in 2007 was incorrect, but that statement continued by stating that the specimen was currently in use which was correct.

The evidence submitted, as explained in opposer's main brief, clearly supports a finding that there was no fraud. A judgment to that effect is requested. The case can then proceed on the issue of likelihood of confusion.

Respectfully submitted,

Novozymes BioAg, Inc.
By its Attorneys

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Certificate of Service

I hereby certify that on February 22, 2012 a true and correct copy of Response of Opposer to Cleary's Brief in Opposition to Opposer's Motion for Summary Judgment on Fraud Counterclaim were served by first-class mail, postage prepaid, with a courtesy email, to counsel for Applicant, Cleary Chemicals, Inc.:

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